

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee,

-v-

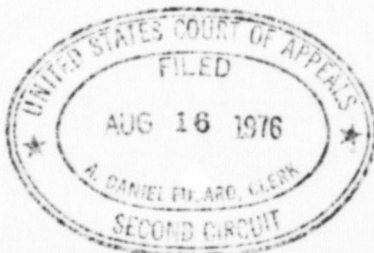
JAMES RIZZIERI,

Appellant.

76-1129

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REPLY BRIEF FOR APPELLANT JAMES RIZZIERI



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Appellee,

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Docket No. 76-1129

JAMES RIZZIERI,

Appellant.

REPLY BRIEF FOR APPELLANT JAMES RIZZIERI

POINT I

DRUG PURCHASES BY INDEPENDENT
DEALERS FROM A COMMON SOURCE
DOES NOT BIND THEM INTO A
SINGLE CONSPIRACY.

If the law is that all independent dealers who purchase drugs from a common source thereby join a single conspiracy with all the others who purchased from that source, whether before or after, then we agree with the Government that it proved a single conspiracy.

Our statement of facts and that of the Government are practically identical. We need add nothing here. We note only that Blase's presence when Rossi and Rizzieri picked up heroin (GBr 16, **)* counted for nothing because as the Government concedes, he had terminated his partnership with

* "GBr shall be used to refer to the Government's brief and "RBr" to our main brief for Rizzieri.

Rossi (Ibid); and that Rizzieri used Mengrone to send his "Don't worry" message to the Riccos from prison (GBr 9-10, 52-53) because Mengrone owned the Magic Carpet Bar where the Riccos often went (GBr 9). Mengrone did not get involved in drugs with the Riccos until two months after Rizzieri's arrest (GBr 25*)*.

Contrary to the Government's contention (GBr 14) this was not a "classic single chain narcotics distribution conspiracy" (GBr 14). It was a classic hub/spoke conspiracy (at least as to Rizzieri) where many people bought from the Riccos before Rizzieri, many bought after him, and Rizzieri was not a conspirator with any of those others. The notion that there was a "real", "tightly-knit" Ricco organization (GBr 15, 27) which could make all who dealt with the Riccos co-conspirators with everyone else, is nonsense.**

* GBr 25,* says Rizzieri sent a message about his "narcotics activities" through Mengrone. This is nothing more than the same "Don't worry" message.

** GBr 5 says "The Conspiracy Begins" in March 1971. Why then? If the Government's theory is right, the conspiracy began whenever the Riccos made their first sale, be that ten, twenty or thirty years before.

The Government intimates at GBr 26,* that facts which bear on the conspiracy issue ought be excluded from consideration because they "were brought out principally on cross-examination by defense counsel," a rather astounding position. The Government states further that the only resemblance between this case and United States v. Bertolotti, 529 F.2d 149 (2d Cir.1975), is

(cont'd)

As to prejudice, that does not turn on whether one is a major or minor participant (GBr 27, ***), as Bertolotti demonstrates. The trial was long and complicated enough, as the Government concedes in its motion in this Court asking to file a brief in excess of 50 pages.

The proof not involving Rizzieri was horrendous (RBr 14-15); and the considerations which led to the severance of Blase clearly dictated the severance of Rizzieri as well (RBr 15-16).

POINT II

THE SALES WHICH WERE OR COULD
HAVE BEEN CHARGED IN THE EASTERN
DISTRICT SHOULD NOT HAVE BEEN
ALLOWED INTO EVIDENCE

Nothing the Government says in its brief defeats our arguments in our main brief, Point II.

1. Rizzieri himself told Ferrarone that the March drugs came from the Long Island source (RBr 20). Donovan's contrary statement could not overcome this, even coupled with Rossi's general testimony, not connected with the later sales, that Rizzieri told him he was still purchasing from the Riccos (GBr 52), or Rizzieri's "Don't worry" message to Mengrone. The testimony could not come in as "pattern of conduct", GBr 53, because its prejudice far outweighed its

**(cont'd)

the presence of two common witnesses, ignoring the Mengrone tapes (GBr 20,***), and proof about Browning, Coralluzzo, Guerra and the Flynn, Lucan and Matthews - Harrison rip-offs (RBr 5, 7, 8).

probative value. In any event, error still existed in that no limiting instruction, required for pattern of conduct evidence, was given. United States v. Papadakis, 510 F.2d 287 (2d Cir. 1975).

2. If, as the Government says, the sale was a Ricco transaction, then the Government knew it when it filed the Eastern District indictment. Between the cooperation of Donovan, Pete the Weep -- Rizzieri's biggest customer (RBr 18), and Ferrarone's continuing relationship with Rizzieri, there was no apparent excuse for the Government's failure to include the other sales in the Eastern District indictment. Plainly the Government was angling for tactical advantage. Plainly also Rizzieri was prejudiced, both for the reasons stated at RBr 19 and also, as the Government concedes (GBR 50), because he had to take part in a second trial where he was obliged to admit crimes which should have been taken care of in the first indictment. For these reasons, the Marion claim must be sustained. Cf United States v. Finkelstein, 526 F. 2d 517 (2d Cir. 1975)*; United States v. Schwartz, 535 F. 2d 160 (2d Cir. 1976); United States v. Eucker, 532 F. 2d 249 (2d Cir. 1976).

* Finkelstein held that it is still an open question in this Circuit as to whether appellant must show prejudice, if he has shown intentional delay of the prosecution to gain tactical advantage.

3. We can not dispute the Government's statement that conspiracy and the substantive offenses have been treated separately (RBr 19). We suggest that this is an appropriate case not to apply that separate treatment. The fundamental unfairness of it all (RBr 19) is demonstrated by the Government's statement that none of our argument applies to the February 1973 sale because Rizzieri has not yet been charged with that offense (GBr 48, **). Under the Government's view, it is free to bring yet another proceeding based on that sale.

4. The errors of which we speak infected the whole trial and require a reversal as to every count.

POINT III

THERE WAS INSUFFICIENT EVIDENCE TO CONVICT RIZZIERI OF THE NOVEMBER 22, 1972 SALE

The Government concedes that Ferrarone's testimony about the November 22, 1972 sale was not enough to convict Rizzieri (GBR 48, RBr 21). Contrary to the Government, Rossi's general testimony, not specifically related to that transaction, did not remedy the failure in the Government's proof.

Respectfully submitted,

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